Royalite, a Division of Uniroyal Technology Corporation *and* United Paperworkers International Union, AFL–CIO, CLC. Cases 25–CA–23836 (Amended) and 25–CA–23865 (Amended)

September 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 17, 1996, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt his recommended Order.

The judge found, among other things, that the Respondent unlawfully discharged Alfredo Lozano on March 28, 1995,[3] because of his union activities. We affirm this finding.

The credited record evidence shows that the Respondent suspended Lozano, a leading union adherent, on March 21, the day he testified in a manner adverse to the Respondent's position in the hearing on its objections to a Board-conducted representation election. On March 28, Lozano was formally discharged. During his testimony in the representation hearing, Lozano acknowledged that the employment application he had completed before his hire in 1992 did not indicate his 1986 conviction and 42-month incarceration on felony cocaine charges. The judge in the instant proceeding credited Lozano's testimony that he did not intentionally falsify his answer to the question on the application concerning prior convictions.[4]

The Respondent contends that it terminated Lozano because he falsified his employment application, whether intentionally or unintentionally. In support of its contention, it relies on certain company policies and two previous discharges. For the reasons described below, we are not persuaded that the asserted policies and practices warrant reversing the judge's findings.

The Respondent maintained an employee handbook, dated 1987, that designated ''Serious Rule Infractions . . . which *may* result in discipline including suspension, or if warranted, immediate discharge.'' (Emphasis added.) Among the infractions listed is ''[g]iving false information, such as: (a) [f]alse statements on employment application or medical records.''[5]

A March 29 memo that was distributed after Lozano's discharge purports to explain the Respondent's practice with respect to the institution of discipline under the handbook provision. It states in pertinent part:

> . . . misrepresenting or omitting information on a job application or during the interview/hiring process may result in termination, depending upon the nature of the misrepresentation, error, or omission . . . . While not every subsequently discovered error or omission will result in the employee's discharge, if the omitted or misrepresented fact would have caused the [Respondent] not to hire the employee (had the [Respondent] known about it at the time), then it is the Company's practice to terminate that person.

The Respondent's reliance on these documents in support of its defense is not persuasive. First, we note that the handbook provision is discretionary as to whether the omission of information on a job application will result in discipline. It states only that employees *may be disciplined* for such an infraction. Significantly, the discipline imposed may be something short of discharge. Second, the Respondent's post hoc explication of the handbook provision by way of the March 29 memo reaffirms that the omission of information on a job application will not automatically result in discipline. It further states that it is the Employer's practice to discharge an employee for a subsequently discovered omission or misrepresentation if the omitted or misrepresented fact would have caused the Respondent not to hire the employee had it known of the fact. The record establishes that the Respondent knowingly hired a convicted policeman who had been a member of a burglary ring, and that it knowingly hired prior drug users notwithstanding a strict policy against drug use. These hires make it clear that criminal conviction and prior drug activity do not preclude the hire of an individual. Hence, we agree with the judge that the Respondent's assertion that Lozano's discharge was law-

[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[3] All dates are in 1995, except where otherwise stated.

[4] The judge also found that while employed by the Respondent, Lozano openly talked about his criminal conviction with coworkers and supervisors, and that Lozano's criminal past and his subsequent religious conversion were well known throughout the plant.

[5] We find merit in the Respondent's exception to the judge's finding that the Respondent had no written policy on discharge for falsification of an application. The foregoing handbook provision constitutes such a written policy.

ful because it would not have hired him had it known of his conviction is not supported by the evidence.

The Respondent further contends that the previous discharge of two employees who falsified their employment applications supports its termination of Lozano. However, as the judge found, the two discharges are distinguishable from Lozano's discharge. One involved a managerial employee whose incompetence belied the educational background he falsely claimed on his application to possess. The other involved an individual who intentionally misstated on his application and in his job interview that he was not related to anyone employed by the Respondent. In fact, his stepfather was an employee, and the Respondent maintained a policy against nepotism that barred the individual's hire. In each of the foregoing instances, it seems clear that the Respondent would not have employed these individuals had it known of these facts at the time of their hire. Thus, in contrast to Lozano's discharge, the discharges of these individuals were consistent with the Respondent's policy as described in its March 29 memo.[6]

In sum, the foregoing establishes that the Respondent's hiring history would not have precluded Lozano's hire, and that no personnel policy required his termination. In these circumstances, we find that the Respondent failed to rebut the General Counsel's prima facie case that it discharged Lozano because of his union activity and that his discharge violated Section 8(a)(3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the judge and orders that the Respondent, Royalite, a Division of Uniroyal Technology Corporation, Warsaw, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] It is axiomatic that incompetence is grounds for termination, and that the lack of an adequate educational background can preclude the hire of a particular individual for a managerial position. The policy against nepotism speaks for itself.

Walter Steele, Esq. and *Norton B. Roberts, Esq.*, for the General Counsel.
Jay Kiesewetter, Esq., Terrie L. Dill, Esq., and *Janis A. Pope, Esq.*, of Memphis, Tennessee, for the Respondent.
Ted Sautter, of North Webester, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The original charge in this case was filed by the United Paperworkers International Union AFL–CIO, CLC (the Union), on March 30, 1995, and a copy was served by certified mail on Royalite, a Division of Uniroyal Technology Corporation (the Respondent), on March 30, 1995. The amended charge in Case 25–CA–23836 was filed by the Union on March 31, 1995, and a copy was served by certified mail on the Respondent on March 31, 1995. The original charge in Case 25–CA–23865 was filed by the Union on April 12, 1995, and a copy was served by certified mail on the Respondent on April 12, 1995. The amended charge in Case 25–CA–23865 was filed by the Union on May 9, 1995, and a copy was served by certified mail on the Respondent on May 10, 1995. The second amended charge in Case 25–CA–23865 was filed by the Union on August 25, 1995, and a copy was served by certified mail on the Respondent on August 25, 1995.

An order consolidating cases, consolidated complaint and notice of hearing was issued on September 21, 1995. The consolidated complaint, among other things, alleges that the Respondent discharged Alfredo Lozano in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The complaint came on for hearing at Warsaw, Indiana, on February 21–23 and May 15–17, 1996. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of facts and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT,[1] CONCLUSIONS, AND REASONS THEREFOR

I. BUSINESS OF RESPONDENT

At all material times the Respondent, a corporation, with an office and place of business in Warsaw, Indiana (the Respondent's facility), has been engaged in the manufacture and sale of plastic sheet stock.

During the past 12 months, the Respondent, in conducting its business operations described above, sold and shipped from its Warsaw, Indiana facility goods valued in excess of $50,000 directly to points outside the State of Indiana.

At all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ASSOCIATION INVOLVED

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] The facts found here are based on the record as a whole and the observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings here, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

III. THE UNFAIR LABOR PRACTICES

A. *The Alleged 8(a)(1) Violations of John Zappala*

John Zappala was a vice president and general manager of Royalite, a Division of Uniroyal Technology Corporation.[2] He is responsible for ''running [its] entire business.'' Royalite includes three manufacturing plants at Warsaw, Indiana; Rome, Georgia; and Redlands, California, and an office in Mishawaka, Indiana. During the period in which the Union was campaigning for union votes for an election to be held on February 10, 1995, Zappala held what was termed a town meeting at the Warsaw plant. It had been the Respondent's custom to hold town hall meetings, usually once a year. According to Zappala ''the town hall meetings are a forum for the executive management, vice president, and general manager in particular, to discuss the performance of the corporation and the division with the employees.'' Meetings in December 1994 were held in the Respondent's conference room. ''We divide the shifts up so we can keep the manufacturing operation running, so we take in portions of the shift.'' At the meetings Zappala announced that the Respondent would be giving a 3-1/2-percent wage increase on January 30, 1995, which was the ''12-month anniversary date . . . of the previous wage increase.'' The meeting was turned over to questions. Some questions were answered at the meeting but others were written down to be answered later. ''We tried to answer the simple questions . . . and others might have been questions or suggestions and generally required more time . . . we would . . . collect those questions . . . we would post a written response to the questions.''

Several of the employees testified about what Zappala said at the meetings[3] at which Zappala spoke. Randall Lee Zorn testified that Zappala said, ''[We] didn't need an outsider to make our decisions for us.'' Questions were posed: ''[W]hat was it that we wanted . . . . [W]hat do we need to do to make this right. What do we need to do to satisfy the people.'' Larry Brubaker testified that Zappala said that ''[h]e had come to us and said that he understood . . . at the plant, that people weren't happy'' and ''that they could fix the problems that was [sic] going on, that they did not need any outside intervention.'' Zappala also said he wanted to know what was wrong that ''they could take care of and remedy.'' He also said, ''[We] did not need an outside source.'' There were 12 to 15 employees in Brubaker's group. They were ''pretty much pro-union people.''

Rodney Von Smythe testified that at a meeting that he attended in which Zappala spoke, all the employees attending the meeting wore union buttons. There were ''few'' employees in this meeting. Zappala asked the employees, ''What was our gripes.'' The employees responded. He said he would look into the ''gripes'' and see if they were feasible. Zappala testified that he did not solicit gripes, mention the Union, or tell the employees he would fix problems.

Zappala testified that at the TQM meetings he did not discuss the Union, or ask people to tell their gripes; he never asked employees what they wanted to satisfy them or eliminate their complaints nor did he promise to fix the problems, improve anything, or remedy their complaints.

I have weighed the credibility of the witnesses, their demeanor, and the fact that Zappala was following the Respondent's line of promoting union opposition. I discredit Zappala where his testimony conflicts with that of the witness mentioned above.

When considered with Zappala's statements, ''we didn't need an outsider to make our decisions for us'' and that employees did not need an outside source or intervention, and Zappala's questions of employees about what were their ''gripes''; and that the Respondent would look into such gripes, impressed employees with the idea that the Respondent would respond favorably to their requests. This was also implicit in Zappala's query regarding what was wrong that the Respondent could take care of and remedy. Zappala's remarks carried the idea that the employees did not need a union because the Employer would favorably resolve their problems and were in violation of the Act. *Merle Lindsey Chevrolet*, 231 NLRB 478 fn. 2 (1977); *Uarco Inc*., 216 NLRB 1 (1974).

B. *The Alleged 8(a)(1) Violations of James Schwinn*

James Schwinn was employed by Uniroyal Technology. He was director of industrial relations and equal employment opportunity programs. He was ''in charge of all human resource activities for the entire corporation, reporting to the vice president of human resources and administration, Martin Gutfreund'' who was ''the director of equal employment opportunity programs for the corporation.'' He was responsible for 11 plants including the corporate headquarters. Schwinn handles contract negotiations. Schwinn played a ''role in the company's communication effort with the Warsaw employees prior to the election.'' On January 31, 1995, he held a series of nine meetings with employees lasting approximately 2 hours. Gutfreund invited him to conduct these meetings. The purpose of his speaking was ''[t]o discuss bargaining practices in the company . . . . It was designed merely to summarize the company's bargaining history since 1990–91.'' Schwinn spoke from a transcript prepared by a lawyer. Schwinn knew that a union election campaign was occurring. His remarks were aimed in that direction.

It is obvious from a review of Schwinn's transcript what the Respondent's purpose was in giving the speeches. It was to portray the Respondent's hard bargaining position and its insistence on obtaining concessions from its unionized employees and to persuade employees not to vote for the Union. Thus, Schwinn told how Port Clinton, a union plant, was closed for 2 years and was only opened when concessions were given and how in Stamford, Connecticut, the Respondent demanded concessions that the employees resisted with a strike, to which the Respondent responded with replacements and the imposition of its demanded concessions. Only nine strikers returned for work when the strike was called off

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[2] Beginning sometime in October or November 1994, the Union began an organizing drive to seek representation of the Respondent's employees at the Warsaw facility. On December 22, 1994, the Union filed an election petition that resulted in an election on February 10, 1995. The Union prevailed 62 votes for and 60 against the Union. The Respondent filed objections to the election, which were overruled by the Board, after a hearing on March 20, 1995. The matter is now pending on appeal in the U.S. court of appeals.

[3] Zappala also addressed employees at what were termed TQM meetings (total quality management).

at Stamford.[4] Schwinn also mentioned Stoughton which is organized by the Union. He foretold that when negotiations opened the Respondent would demand concessions and that the Respondent would bring Stoughton in line with Port Clinton and Stamford. These were the kind of negotiations the Warsaw employees could look forward to if they chose the Union. ''It is a new day at the bargaining table. My marching orders have been to get the kinds of reductions and changes in these contracts that will bring down the cost of operating those plants.'' Moreover, Schwinn said in respect to concessions, the Union knew that ''Uniroyal is *determined* to get these changes—so determined that, so far, the company has shut down a plant—and has taken a bitter strike when the unions failed to agree to give the company the kinds of changes that it believes it must have.'' Schwinn's parting shot was wait until he negotiated at Stoughton[5] and then make comparisons; vote the Union in, then instead of hearing from Stoughton, ''we'll learn from you.'' (The Respondent was demanding concessions at Stoughton.)

During his speech Schwinn sometimes varied from the transcript and after his speeches he opened the meeting for questions. According to employee Zorn, Schwinn said at the meeting that ''he would be required to come to negotiations, but he didn't have to agree to anything'' and that he would get the Stoughton, Wisconsin plant back in line. Zorn further testified Schwinn said, ''I broke the Union in such and such a place. I broke the Union here. And I am going to break the Union here in Warsaw.''

Employee Smythe testified that Schwinn said, ''[B]argaining starts from scratch.'' ''It don't start [from] where you left off.'' Smythe quoted Schwinn as saying, ''Don't get a Union. And see what I do to the Stoughton, Wisconsin plant. Because there is going to be a lot of changes take place there . . . . [I]f you do get a union, then I can make you the example to them.'' The Respondent's practice was to hire replacements. The Stoughton plant was the highest paid plant in the Company.

Schwinn generally denied the testimony of Zorn and Smythe. Joseph B. Bell, retired manager for factories in the northern division, also denied the testimony of Smythe and Zorn. I credit Smythe and Zorn. The remarks they attribute to Schwinn were in line with the transcript of his speeches.

After Schwinn had concluded his speeches he opened the meeting to employees' questions. In answer to a question Schwinn said that all subjects of mandatory bargaining were subject to the bargaining process. Bell testified that Schwinn said that he was a ''tough negotiator.''

It would have been a dull employee indeed who would not have derived from Schwinn's remarks that it would have been futile for the employees to have chosen the Union as their bargaining representative, because the Union would be broken, bargaining would start from scratch,[6] concessions would be demanded, and the employees would lose benefits. Schwinn's remarks constituted a violation of Section 8(a)(1) the Act. See *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 891 (1994).

C. *The Alleged 8(a)(1) Violations of Stephen Alan Godsell*

Rex Alan Rife, an extruder operator, went to the foreman's office together with Gerald Wayne Boyer, production supervisor, and Stephen Alan Godsell, at that time human resource manager, in January 1995. Boyer left. Godsell, according to Rife, questioned him on why he had left the ranks of the antiunion people (Rife had left the antiunion ranks and commenced wearing a union button). Rife told Godsell that the reason was ''the wage problem and the insurance problem with the Company.'' Godsell then asked Rife if he ''knew of any way that we could satisfy everybody in the plant . . . in response to the insurance problems.'' Rife replied that he ''didn't have any idea.'' Godsell said that he was ''sorry'' that Rife had ''left the ranks.'' Godsell admitted that he had made the comment to Rife, ''I'm sorry to hear that you're supporting the union.'' Earlier that morning Godsell had learned from Rife's wife, a cafeteria attendant, that Rife had changed from a ''company supporter'' to a union supporter. Godsell denied the above-noted interrogations.

Lozano testified that among other things Godsell said to him, ''We hear that you are doing a lot of union talk. And you know that we don't like that kind of stuff around here.'' The General Counsel claims that the above remark created an impression of surveillance of Lozano's union activities citing *7-Eleven Food Store*, 257 NLRB 108 (1981). I agree with the General Counsel; it can be reasonably assumed from Godsell's statement that Lozano had been placed under surveillance. Godsell's remark was in violation of Section 8(a)(1) of the Act as well as his interrogations of Rife. See *Rossmore House*, 269 NLRB 1176 (1984).

I credit Rife and Lozano.

D. *The Alleged 8(a)(1) Violations of Michael Garrett DeWald*

Michael Garrett DeWald was a production supervisor from December 1994 through January 30, 1995. Ralph Edward Crawford who had been an inspector/packer and one of the Union's organizers until February 2, 1996, in a conversation with DeWald, testified that DeWald said that bargaining would ''start from scratch'' and ''you could lose all your benefits.'' The conversation took place while DeWald was Crawford's supervisor in 1995. According to Crawford, DeWald also said that there was a strong possibility that the plant would close if the Union came in. DeWald also told Crawford that he had come from a town where he believed that the Union had broken the company and turned the town into a ghost town; that the same would happen with the Respondent if the Union prevailed. Crawford had many conversations with DeWald. DeWald admitted that he talked to Crawford about the Union. DeWald denied that he had said bargaining would start from scratch. DeWald generally denied Crawford's assertions.

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[4] The wages at Warsaw were better than those at Stamford.

[5] Stoughton had better benefits and wages than Warsaw.

[6] The Respondent maintains that Schwinn, a seasoned labor relations professional, aware of the sensitivity of using words like ''bargaining from scratch'' would never use such words to describe the bargaining process; however, it is equally as reasonable that Schwinn, whose objective was to persuade employees to disfavor the Union, would have known that the use of ''bargaining from scratch'' would have deterred employees from favoring the Union and thus furthered his objective to keep the Union out of the plant. His use of the words was apparently deliberate as was his written transcript.

Employee Alfredo Lozano, an extrusion operator,[7] testified that DeWald said to him, ''This is what the Paperworkers Union done to Knuckle Valve. They made them lose their job. And this is what they are going to do to you at this Company.'' DeWald showed Lozano a ''piece of paper'' showing that a factory called Knuckle Valve had moved out of the area. Lozano further testified that the first day he came into the plant wearing a union button DeWald asked him ''what was it'' and ''he just walked away.''

According to Lozano, DeWald also said to him and others at lunch ''the Union doesn't have any power to do anything but call a strike. That the Company would probably . . . would not under any circumstances, let the Union in anyway.'' Lozano also had many conversations with DeWald.

In view of the fact that Schwinn had told the employees that if the Union were selected as a bargaining agent the Respondent would make Warsaw an example for concessions demanded, DeWald's ''scratch'' remark took on illegal essence and threatened a loss of existing benefits and left employees with the impression that what they ultimately would receive depended on what the Union could induce the employer to restore. See *Lear-Siegler Management Service*, 306 NLRB 393 (1992). DeWald's ''bargain from scratch'' and ''you could lose all your benefits'' remarks were in violation of Section 8(a)(1) of the Act. Along with DeWald's other remarks, his statement implying that the plant would close if the Union came in was in violation of Section 8(a)(1) of the Act. Likewise DeWald's statements made to Lozano set out above violated Section 8(a)(1) of the Act.[8]

E. *The Alleged 8(a)(1) Violations of Gerald Wayne Boyer*

Gerald Wayne Boyer was a production supervisor. Employee Rex Alan Rife was first against the Union and then became a union supporter. Boyer was aware that Rife had been a procompany man. When Rife commenced wearing a union button, in January 1995, according to Rife, Boyer asked him, ''Why I started wearing the buttons.'' Boyer also said that ''he didn't think that we needed a union.'' Rife told Boyer that he had ''changed [his] mind about [his] stand on the Union'' that he ''felt like the Union would do [him] and [his] family more good at that time, than not having [a] Union.'' Boyer admitted a conversation with Rife about the Union but denied he had asked Rife why he was wearing the union button. He admitted that he said that he believed a ''union was not needed in the factory.'' Boyer denied that he had interrogated Rife.

Prior to Rife's defection to the Union he had asked Boyer whether he could wear or produce antiunion T-shirts and buttons. Boyer, after contacting Godsell, told Rife that ''it was all right that he do that.''

Considering the relationship between Boyer and Rife it appears reasonable that Boyer would have asked Rife why he began wearing the union button. I credit Rife, demeanor considered. I find that Boyer's interrogation of Rife as above detailed violated Section 8(a)(1) of the Act. See *Rossmore House*, supra.

F. *The Alleged 8(a)(1) Violations of Terry Conley*

Terry Conley was an area production manager. According to employee Smythe, Conley phoned him and asked him whether he had changed his mind about the Union ''like everybody else . . . because everybody was pretty mad—upset about it the next day.'' Smythe answered, ''Terry, I don't know. I mean, I am telling you, they're messing up, I don't know why they did this.'' Conley then mentioned there was to be a union meeting. Smythe replied that he was going to the meeting. ''I would see what I could find . . . out for you.''

Among other things Smythe reported to Conley after the meeting ''they have got to get something going here, or there is going to be a union.''

Conley testified that he knew that Smythe had been antiunion and had said that the ''Union was a bunch of bullshit.'' ''He talked about going to meetings . . . and coming back and telling the Company what they had to say.'' Smythe was ''gung ho for the company.'' Conley admitted conversations with Smythe but denied any interrogations.

As in the case of Boyer it seems reasonable that Conley would have asked Smythe if he were defecting from the Union. I credit Smythe, demeanor considered. Conley's interrogation was in violation of Section 8(a)(1) of the Act.

G. *The Alleged 8(a)(1) Violations of Mike Serdinak*

Mike Serdinak was a quality manager. According to employee Brubaker, Serdinak in January 1995 said that it was ''probably the truth'' that the Respondent would bargain from scratch. Brubaker defined bargaining from scratch ''the term bargaining from scratch means that you've got to start with nothing and begin with nothing.''

Serdinak admitted a conversation with Brubaker but denied any reference to bargaining from scratch. He admitted saying, ''In collective bargaining there is give and take and there's no guarantee that you'll end up with more or less in wages or benefits.''

The statement attributed to Serdinak was not of such a definite character as to constitute an 8(a)(1) violation.

H. *The Alleged 8(a)(1) Violations of Leonard Dewayne Wood*[9]

Leonard Dewayne Wood was a production foreman. According to employee Smythe around January 5, 1995, he had a conversation with Wood in Wood's office. Wood said, ''if we got a union in, that it wouldn't matter. Because they won't listen to you . . . . It won't do [no] good.'' Smythe was wearing a union button at the time Wood testified of the conversation. ''I . . . tried to let Rodney know that there wasn't no guarantee that he was going to get any of those things.'' ''Like things like we were talking about what the Union could do and what they couldn't do. What the Company might do, what the Company may not do.'' ''I told Rodney what I felt the Company may or may not do. Straight up.''

[7] Lozano, according to the General Counsel, was discharged unlawfully. (See, infra.)

[8] I considered DeWald to be a mendacious witness whose demeanor reflected the falsifications he uttered. As among him, Crawford, and Lozano I credit Crawford and Lozano.

[9] An amendment to the complaint was allowed charging that Wood informed employees it would be futile to join a union.

In view of Wood's testimony, I am convinced that Wood gave Smythe the impression that it would be futile for the employees to chose a union. Thus Wood's remarks were in violation of Section 8(a)(1) of the Act.

I. *The Discharge of Alfredo Lozano*

The Respondent insists that Alfredo Lozano was discharged because of falsification of his job application. As stated in the Respondent's brief, ''One of the questions in the application form called for Lozano to state whether he had ever been convicted of a criminal offense other than a traffic violation. In response to this question Lozano responded no. In fact Lozano had been convicted and incarcerated for violating a federal felony statute selling cocaine.''

> Lozano signed his name at the end of the application, certifying that the information he had given was true and complete and that his giving any false information or withholding any information could be cause for his discharge.

Lozano was arrested on December 6, 1985, according to a newspaper article, as a suspected cocaine dealer. In 1986, Lozano was convicted and sentenced to 42 months confinement at Lexington, Kentucky. He was hired by the Respondent in 1992. The union campaign commenced at the Respondent's facility in October and November 1994 with which Lozano became affiliated. A petition for an election was filed on December 22, 1994. The election was held on February 10, 1995, which the Union won. The Respondent filed objections to the election which were heard on March 20, 1995. Lozano, who testified as a witness called by the Union, revealed that he had been convicted of felony.[10] On March 28, 1995, Lozano was discharged. On July 20, 1995, the Union was certified as the bargaining agent. The matter is now on appeal.

Lozano was hired by Joseph B. Bell, the then human resources manager. Bell did the ''hiring, firing, discipline, fringe benefits, safety, various committees all things related to personnel functions.''

Bell said that Lozano first came to his office with David Antu from the Spanish-speaking community.[11] Bell ''had worked with these people a lot.'' Antu introduced Lozano to Bell and said that he recommended him and that he was ''a good man.'' He was represented to be a preacher who ''couldn't make enough money'' by preaching and needed a job. This meeting took place ''within a month of the time [he] was offered a job.''

Lozano and Antu were told by Bell that the Respondent only hired through the State Employment Office, which did the preliminary screening of employees, and that Lozano should go there and get on the Uniroyal list. (The employment office was familiar with the type of employees the Respondent hired.) Lozano went to the employment office where his name was placed on the Royalite list.

Later Bell called Lozano to come in and make out an application for employment. Lozano tendered an application which Bell reviewed. During all employment interviews Bell testified that he said, ''we do a drug screen and a criminal records check and verification of employment and I'll get in touch with you as I get these things done.'' According to Bell the check was never conducted. Although the Respondent had no written policy against hiring felon drug traffickers and though Bell had hired felons he claimed that he would not have hired Lozano.

Bell had hired two felons who were on parole. One of the felons, Larry Harrall, a policeman, was convicted of participating along with other policemen in a burglary. ''I decided [that] it [the offence] wasn't job related. And I hired him.'' ''I didn't think that there was anything relative to this robbery and burglary that would tie in with that job.'' ''I always tried to match and see whether the felony was job related.'' In reviewing Lozano's offense Bell implied that his offense would be a bar to employment, ''[b]ecause of the Company's position as regards drugs and drug use.'' (The Respondent insisted on a ''drug free work place.'') ''I would not have a job match like that.''[12]

Bell testified when asked whether he had ever experienced a misrepresentation on an application, he replied, ''On the misrepresented on the application, no. Well, there was a mistake once, which I recall a fellow marking that he'd been convicted of a felony when it wasn't.''[13] Bell also had hired persons who had been drug users.

Bell also testified: ''[I]f a supervisor knew of anyone who had been hired who was a known drug user, abuser or trafficker, it was their duty and responsibility to report it to someone of higher management.'' Supervisors apparently did not follow this admonition in regard to Lozano, that is, if they were telling the truth.

Lozano was born and lived in Chicago while a youth. He became a part of a youth gang in Chicago that was engaged in criminal activities. His life was hazardous and combative. It was a hard life and unlawful. He ended up in a reform school from where he received his high school diploma. Thereafter Lozano engaged in the restaurant business in Warsaw, Indiana, where he got mixed up in the using and selling

[10] One of the Respondent's objections read as follows:

> 1. Through the rhetoric of the Union's representatives, in-plant agents, and supporters, religious-related fear, prejudice and intimidation was injected into the Union's organizing campaign and the election process by the making of irrelevant, improper, inflammatory, threatening, and coercive religious-related statements and appeals.

This objection was aimed primarily at a statement which included the words ''Mark of the Beast'' (see, infra) which Lozano was alleged to have addressed to another employee. Of this remark the hearing officer wrote, ''The Employer asserts that Lozano's 'Mark of the Beast' statement 'spread like wildfire through the entire facility.'''

[11] Bell testified,

> The Spanish community and I developed a close relationship to get migrant workers into our factory and so I always heeded these recommendations because they were always good. I always asked for good people who wouldn't cause trouble and that would fit in with the other employees and I always got good recommendations.

[12] Lozano's several years as a stellar employee for the Company is proof that his felony conviction was not job related. Bell's speculation that Lozano's background was counter to the Company's drug free plant is spurious for who could he better as a protagonist for the Company's policy than Lozano, a rehibilitated drug user and trafficker who was devoting his life among other things to a drug free world.

[13] Thus, Bell conceded that a mistake could be made on an application.

of drugs. it was here where he was arrested, convicted, sentenced, and incarcerated. Accounts of this matter were carried in the local newspapers. Lozano served time in the rehabilitation facility in Lexington, Kentucky.

While at Lexington, Lozano became a born again Christian. Since he left confinement he has been devoted to speaking to and advising young people and others of the evils and pitfalls of gang culture and drug use. He is a member of Promise Keepers.[14] Lozano's life has followed the Christian way of living, a fact which became well known among the employees at the Warsaw plant. Godsell who was ''on the floor quite often'' heard that Lozano was ''a born again Christian'' on the floor. Belua Jean Gray, a company clerk, testified that Lozano told her that he was a born again Christian and ''talked about it . . . at length.'' Earl Alan Meck, a production planner, testified that he knew that Lozano was a born again Christian. According to Meck, Lozano was well versed in the Bible and was concerned with young people and wanted to help them.

Supervisor DeWald and Lozano shared religious talks and were friends. DeWald testified that in the spring of 1994 Lozano ''pulled out . . . a newspaper clipping concerning a police chase involving a helicopter and stated something about a notorious drug dealer in this area had ended up being arrested.'' Lozano asked DeWald to take the clipping home to his wife. According to DeWald he did not report this information to his bosses because he and his wife thought ''it was something that the company had . . . was working with the judicial system in trying to reform a *convict*.'' (Emphasis added.)[15] Lozano had told DeWald that he was ''a born again Christian'' and discussed religious matters with him. Lozano testified that he told DeWald that he had been incarcerated in a prison and the reason.

DeWald alluded to Lozano's ''trouble'' in front of employee Crawford.

Production Foreman Leonard Dewayne Wood testified that Lozano ''made many statements of a rough life but he never said he was convicted of anything.''[16]

Employee Rex Alan Rife testified credibly that ''He told me that he was a Christian and that was apparent . . . he showed that he was Christian by his T-shirts and everything. They had Christian like slogans on them and Bible verses.'' According to Rife, Lozano told him ''that he met the Lord in prison . . . how he had been arrested for cocaine sales. [H]e told me about when he was a kid in Chicago, he was in a gang . . . he explained to me some of the things that happened to him since he was in the gang . . . that through the grace of the Lord, that he was changed.'' Lozano and Rife were both members of the Promise Keepers.

In a conversation at which DeWald, Rife, and Lozano were present, according to Rife, Lozano told DeWald, ''He told him about how he had been in the gangs when he was a kid, that he had—you know, he had been shot and he had been knifed, and he had been in fights. And he got into drugs. And his arrest, and his incarceration . . . for his drug dealing . . . about how he had met the Lord in person. And he had gotten involved in a prison ministry. And it had changed his life.''[17]

Rife testified further that he and Production Planner Earl Alan Meck discussed Lozano's involvement in drugs and his incarceration. Meck and Lozano were both born again Christians ''we kind of [drew] strength from each other.'' ''[H]e seemed to know more about the bible than I did and I would ask him questions.'' Rife testified that Lozano's conviction was ''pretty much common knowledge on the floor.''

Zorn, among other things, testified creditably that Lozano said that he ''had been arrested and served 42 months in prison for his sale of drugs.'' Zorn described Lozano's work in the community. ''[T]he work was involvement with youth groups and the children of the community, teaching them against drugs, [and] against gangs . . . . I would have to say the Employer knew, because it had been on T.V. and in the papers.'' Employees in the plant also knew these facts and that Lozano had been convicted of drug trafficking and served time. ''We talked about it quite a bit. It was a big topic of conversation.'' The people who signed the petition to bring Lozano back to work knew about his ''criminal past.''

Lozano testified that he had told Wood that he had been convicted of the sale of drugs and had spent time in prison. Wood responded, ''Everybody has a past, Alfredo. As long as you're a hard worker I was going to have a job. Not all of us are proud of everything . . . we [have] done.''

The credited evidence is that Lozano did not attempt to conceal his past from the Warsaw employees or superiors and that both his criminal past and Christian conversion was well known through the Warsaw plant.

As noted Lozano was an exemplary employee. He cooperated with management by working overtime when others refused; he worked on special projects and developed training

[14] Rife detailed the promises of the Promise Keepers.

> The first one is honor God—or honor Jesus Christ through prayer, worship, and obedience to his word, and the power of the Holy Spirit.
>
> Number two is, pursue vital relationships with a few other men, understanding that I need brothers to help me keep my promises.
>
> Promise three is, practice spiritual, moral, and ethical and sexual purity.
>
> Four is to build strong marriages and families through love, protection and biblical values.
>
> Number five is support the mission of my church by honoring and praying for my pastor and actively giving my time and resources.
>
> Six is to reach beyond any racial and denominational barriers to demonstrate the power of biblical unity.
>
> And seven is to influence my world, being obedient to the great commission.
>
> And the great commission is Matthew 28, 19 and 20.

[15] Incongruously DeWald testified that he did not know of Lozano's conviction although he thought the Respondent was helping a convict. Indeed it is extremely unlikely that DeWald would not have asked his friend Lozano for further details about the newspaper account such as whether Lozano was convicted and served time or that Lozano would not have revealed these things to him.

[16] Respecting credibility it is significant that all the Respondent's witness who testified on the subject denied that they had heard that Lozano was ''convicted or imprisoned.'' This testimony was supportive of the Respondent's claim that it knew nothing of Lozano's conviction until around the time of the objection hearing and thus it had not condoned it.

[17] I credit Rife.

programs. He fitted well in the Warsaw work compliment and was respected by his fellow employees.[18] He was considered a valued employee. On one occasion when Lozano was about to quit Godsell persuaded him to stay.

Everything went well for Lozano in the workplace until after the Union commenced its organizational campaign.

Lozano became a union partisan some time in November 1994. He wore a union button and openly tried to persuade other employees to support the Union.[19]

According to Godsell in late December 1994, an employee, Tim Ellis, came to Godsell ''alleging that Mr. Lozano was using religion and the mark of the beast to try to intimidate him into voting for the Union.'' Godsell quoted Ellis ''that he was telling him that a man had to take a stand and, if a man wouldn't stand up for what was right, that he would have the mark of the beast and be dammed.''[20]

Godsell immediately conferred with Gutfreund at corporate headquarters. The next morning Godsell approached Lozano with the allegations against him. ''I told him that, you know he had been accused of trying to use religion and the mark of the beast to persuade people and intimidate people into joining the Union.'' Godsell did not mention Ellis as the source of his information. ''He [Lozano] denied that he had done anything like that.'' Godsell was in possession of these facts about Lozano at this time. Lozano was a union supporter; Ellis and Lozano participated in Bible studies together and their religious beliefs were a common bond; Lozano was ''very outspoken when it came to religion; Lozano wore ''religious oriented clothing''; Lozano was a member of Promise Keepers; Lozano was a ''very religious man'' and ''a good worker''; ''fellow workers thought a lot of him.'' All this Godsell learned ''from being on the floor, talking to employees.''[21]

After Godsell's discussion with Lozano he did not investigate the mark of the beast incident further. To this question Godsell answered, ''Yes.'' ''You conducted no further investigation because *you believed, Mr. Lozano, correct*?'' (Emphasis added.) Like Godsell I believe Lozano; I think he is a credible witness.[22]

The alleged mark of the beast incident remained dormant until after the representation election which was won by the Union even though the Respondent put on a strenuous campaign fight salted with unfair labor practice (see, supra) against the Union. In spite of Godsell's belief in Lozano's credibility, the mark of the beast was resurrected in the Respondent's objections filed with the Board.

During the investigation of the objections, according to the Respondent's witnesses, it was brought to the attention of the Respondent's attorney that Lozano was a felon and that he had not disclosed it on his job application. Thus, at the hearing on objections, the Respondent's attorney showed Lozano his job application and asked him whether his answer to the question on his application to wit, ''Have you ever been convicted of any criminal offense other than a traffic violation?'' was true. Lozano readily answered, ''No.'' Lozano also freely admitted that he had been convicted of a felony for distributing cocaine. Lozano further testified that the crime was committed in 1984 and that he was convicted in Warsaw and that he served time for it; 42 months at a Federal prison in Lexington, Kentucky. His sentence was 5 years. Thus on March 21, 1995, the Respondent had proof from Lozano's mouth that he was a felon who had been convicted of distributing cocaine and spent time in prison. Additionally, the Respondent knew that his job application did not reveal these facts and that Lozano attributed this fact to his having made a mistake in checking no on the question concerning such subject.

Gutfreund kept abreast of the Lozano affair. Godsell and Dobersch were his sources. According to Godsell, prior to the objections hearing he had learned from the Respondent's attorney that Lozano had a felony conviction for drugs. The attorney told Godsell he had obtained the information from DeWald.[23] Godsell confronted DeWald who confirmed the story. When Godsell was asked if DeWald told him how long he had this information, Godsell answered, ''His comment, I think, was I thought it was common knowledge on the floor.'' Godsell testified that on the day he found out about Lozano's felony conviction on his own initiative he checked his job application. ''[O]ut of curiosity, I had looked at his application and saw that the application was marked no.'' Godsell immediately contacted Gutfreund and relayed this information. ''You sent it directly to the top side.'' ''Yes, sir.'' Although Lozano had readily admitted to all these charges Gutfreund did a computer search and when Lozano's criminal conviction was confirmed thereby he directed Godsell to go to ''the library, try and get the articles, [newspaper accounts] and go to the state police.''

At Gutfreund's direction Lozano was suspended on March 21, 1995, because it came out at the objection hearing that there was ''just evidence that he had been arrested.'' Dobersch and Godsell met with Lozano. According to Godsell, Dobersch told Lozano ''that it had come to our attention that there may be a falsification there on his application and we were suspending him until we completed the in-

[18] This was demonstrated by 76 employees signing a petition to put him back to work.

[19] Supervisor Gerald Boyer described Lozano:

> He was very vocal about being pro-union. He was also stating the same kind of things that was in their [the Union] literature . . . . I surmised that he was . . . definitely an in-house organizer.

[20] Tim Ellis did not testify in these proceedings but did testify in the objections hearing. In the objections hearing he testified that he and Lozano were ''pretty close friends.'' He, until the time of the Union's appearance, went to several promise keeper meetings with Lozano. He told Lozano ''I really am not for the Union because of my biblical thoughts'' and Lozano said he could ''bring in a hundred verses as to why it's ok to support the union.''

Ellis was opposed to the Union and wore a ''vote no pin.'' He was opposed to unions ''because of [his] religious views.'' Apparently Ellis and Lozano engaged in many conversations in which the Union was the subject. In one of these Ellis testified that Lozano said, ''if I wouldn't stand up for against the management of Royalite and support the Union, that I was the same type of person that would end up taking the mark of the beast on my forehead in the last days.'' I consider this testimony a fabrication.

[21] Why Godsell did not learn about Lozano's felony incarceration is not credibly explained in the record.

[22] According to Boyer he had recommended to Godsell discipline for Lozano over the incident. Godsell did not act.

[23] DeWald had denied that he had knowledge of Lozano's conviction. I find that DeWald's answer was false.

vestigation.'' Lozano responded that he had marked the question ''no'' because most applications had said, ''have you ever been convicted of a felony within the last five years.''[24]

Thereafter Gutfreund sent Godsell to Chicago on two occasions to gather information on Lozano's past.

Lozano was discharged by Gutfreund on March 28, 1995.[25] Dobersch testified that when Gutfreund told him to discharge Lozano, Gutfreund said, ''based on the facts we had, and what we knew of Al Lozano, and that he had falsified his records—and that if he didn't falsify his records, he wouldn't have hired him, and we discharged him.''

Dobersch testified that Lozano was fired ''because of the misrepresentation of the felony question'' on his job application.[26]

Lozano was summoned to a meeting on March 28, 1995, in the office of Dobersch. Dobersch described the purpose, ''The purpose of the meeting was to hear from Al, basically, his side of the story. It was WHY did he falsify his employment record.'' Dobersch testified that in respect to calling the meeting Gutfreund said, ''this is not a—a normal thing to discharge people, get Al in, let's hear if there are any other items that have been over looked.'' Present were Lozano, Zorn, Dobersch, and Jean Gray.

Dobersch testified that in the meeting Lozano told him ''that he had a terrible youth. He got in with the wrong gang. And he did some terrible things, including trafficking in drugs, fights, intimidating people, had weapons, was almost killed. But somewhere along the line, he became very, very religious. And he wanted to put all that behind him. [H]e told me that he was counseling youngsters not to go the path that he had gone before . . . and was counseling them not to get involved in drugs.''[27]

Dobersch also testified that ''Al said that it was done [the 'No' in his application] in error. . . . He made a mistake.''[28] Dobersch also quoted Lozano as saying that ''he was in a hurry, and in an error, he didn't read it correctly.''

Dobersch was asked whether he took ''in account mitigating circumstances or make any investigation'' concerning Lozano. Dobersch answered, ''I knew his work record. I listened to what Al had said. And it all boiled down to Al—Al's defense was I did not read the application.'' Dobersch reported to Gutfreund, ''There were no new facts.'' Gutfreund directed Dobersch to fire Lozano ''for falsification of an employment application.''

According to Dobersch he felt that Lozano should have been terminated ''[b]ecause I believe, if you start bending the rules, then you have no rules. . . . I would have been bending the rule where it says you cannot falsify information on your [application].''[29]

Dobersch was asked if he believed Lozano's defense. He answered, ''No, not really.''

Gutfreund described his involvement in the Lozano discharge in great detail in the record. Gutfreund testified that on March 16, 1995, Godsell reported to him that DeWald had been threatened by Lozano who had been in jail. Gutfreund told him to check Lozano's file. Godsell reported that he had checked Lozano's application, ''he hadn't been to jail, he hadn't been convicted of a felony.'' Gutfreund ordered a NEXUS/LEXUS on Lozano and discovered newspaper articles about his crime, thereafter, he directed Godsell to check the library and the Respondent's lawyers and the state police. Gutfreund contacted Bell who told him, according to Gutfreund, that he did not know that Lozano had a record of a conviction for a felony. Bell said he hired Lozano, because he was a minister and was ''down on his luck.'' And that he would do a good job. Gutfreund then directed the Respondent's lawyers to ask Lozano at the objections hearing whether he had been convicted of a felony. Lozano's testimony was reported to Gutfreund, who directed Godsell and Dobersch to have ''a disciplinary airing with Mr. Lozano'' in which Lozano could make statements on his behalf. Gutfreund suggested specific questions ''did he read the application . . . did he know what it said . . . did he falsify the information, if so why.'' According to Gutfreund he suggested these questions ''an employee irrespective of the circumstances, is always given an opportunity to explain themselves, you know, before any [discipline] is made.'' Gutfreund directed that unless the information obtained in this way would exonerate Lozano he should be suspended.[30] ''I wanted a full and complete and formal record.'' After the suspension Gutfreund sent Godsell to Chicago to get records on Lozano. At the time Gutfreund knew Lozano was prounion and had been informed by Godsell of the ''mark of the beast'' incident. He advised Godsell, ''you tell him that, if an individual wants to promote the Union, he does it in non-work areas and in non-work time, [that], in any event, he was not allowed to threaten people.''

Gutfreund admitted he knew from ''miscellaneous employees . . . back through the grape vine . . . to Steve Godsell to myself'' that Lozano was ''active in his church . . . he was doing . . . these good Christian things.'' Gutfreund further testified, ''I had a case in which did we have or did we not have a falsification. The answer was either yes or no. And, *if it was yes, the guy was fired*.'' (Emphasis added.) Gutfreund was asked if he knew that there was a falsification and that Lozano would be fired, why did he direct the second or exit meeting with Lozano. He replied, ''Well, it's a matter of principle, of judicial review, where a person who is charged has [this] fundamental, [you have, rights] you know, to be able to step forward and to say anything they want to have, you know, on their own behalf.''

[24] In a memo of the event it is reported Lozano said ''that he had filled out many applications and most of them asked if you had been convicted in the last 5 years, this is a mistake on my part and a technicality on your part.''

[25] It is significant that Godsell, Warsaw plant's highest human resources officer, made no recommendation.

[26] The Respondent uses a different application at the present time. It requires the employee to disclose only that he has been convicted of a felony in the past 7 years.

[27] The above facts were common knowledge on the floor of the plant. These matters in mitigation which were offered by Lozano were of no persuasion to Dobersch, because Gutfreund had already made an irreversible decision to fire Lozano. This meeting was hypocritical and window dressing.

[28] Dobersch said he didn't believe Lozano, because ''Al is a very good worker. It was out of character.'' The credited record reveals that Lozano would have been ''out of character'' if he had deliberately answered the question ''no.''

[29] The Respondent had no written rule on the subject of application falsification.

[30] Such an inquiry of the character was not held before Lozano's suspension.

Prior to the time that Gutfreund directed the discharge of Lozano he had not seen the notes taken at the exit meeting. ''I had a verbal review with Jim Dobersch, you know, both prior to and after the meeting.''

Further testifying Gutfreund said, ''if there was any mitigation, you know, what was relative to that [falsification], and I have to decide, its very simple right there, if I am going to allow a petition from the floor[31] from fellow employees or testimony from friends, neighbors, or the likes, or words from supervision or fellow employees that an individual is a good employee, having made that decision once, if that's what I can order to be mitigating circumstances, then our rule relative to falsification is just hereby declared from a court standpoint and the law and the EEO and everything else completely null and void . . . .''[32] ''I would not permit a falsification to be mitigated based upon an individual's popularity or alleged work record or the fact that they were Christian or they were any religious sect or they were white or they were black, or they were anything else.''

According to Gutfreund he was ''protecting the integrity of the rule.''

Gutfreund testified that the investigation of Lozano was prompted by an alleged threat Lozano made to DeWald.

According to Gutfreund he had seen Lozano's job application before the objections hearing and that after the hearing counsel told him that Lozano had admitted his criminal record and he had claimed he had ''misunderstood.''

Gutfreund testified that it was a ''dead certainty'' that the Lozano discharge would come before the Labor Board. ''I'm going to be prepared, you know, for every eventuality.'' Gutfreund was a supererogatory witness who gave the impression of covering up the real motive for Lozano's discharge.

Godsell testified that in respect to discharges, ''You weight the circumstances, you weigh the various factors, and you look at mitigating circumstances.''[33]

Lozano credibly testified that before he went to the representation hearing he did not know he had misrepresented anything on his job application; that he had told Supervisors Wood and DeWald about his past and that he had been in jail for possession of cocaine with intent to distribute; that he talked to about 40 or 50 employees about his conviction, incarceration, and conversion; that he never tried to conceal his record from other employees; that he did not realize that he marked his job application with a ''no''; that he and DeWald embraced each other often.

After Lozano's discharge the Respondent issued a memorandum dated March 29, 1995, to its employees rationalizing its action in discharging Lozano. In its memorandum the Respondent recited the rule

> Under the Company's rules and policies, misrepresenting or omitting information on a job application or during the interview/hiring process may result in termination, depending upon the nature of the misrepresentation, error, or omission. Significantly, a statement to this effect, warning applicants of the possible consequences of supplying erroneous information, appears on the application itself. *While not every subsequently discovered error or omission will result in the employee's discharge, if the omitted or misrepresented fact would have caused the Company not to hire the employee (had the Company known about it at the time), then it is the Company's practice to terminate that person.* [Emphasis added.]

Bell who hired Lozano had no difficulty hiring a policeman who had been convicted of a felony burglary or employees who had been drug users.

Conclusions and Reasons Therefor

It is well established that the General Counsel under the Act bears the burden of proving an unlawful discharge. Once the General Counsel has established a prima facie case of possible discrimination; however, it becomes the Respondent's burden to show that the employee would have been discharged even though the employee was a union activist who was engaging in union activities: See *Wright Line*, 251 NLRB 1083 (1980), and *Manno Electric*, 321 NLRB 278 (1996). ''[A]n employer may hire and discharge at will so long as his action is not based on opposition to union activities.'' *NLRB v. Little Rock Downtowner, Inc.*, 341 F.2d 1020, 1021 (8th Cir. 1965). ''[A]bsent [a] showing of antiunion motivation, [an] employer may discharge [an] employee for [a] good reason, [a] bad reason, or for no reason at all . . . .'' *O. A. Fuller Supermarkets*, 374 F.2d 197, 198 (5th Cir. 1967). However, the ''mere existence of [a] valid ground for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.'' *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964).[34] ''A justifiable ground for dismissal is not defense if it is a pretext and not the moving cause.'' *NLRB v. Solo Cup Co.*, 237 F.2d 521, 525 (8th Cir. 1956). ''[T]he 'real motive' or the employer in an alleged Section 8(a)(3) violation is decisive.'' *NLRB v. Brown Food Store*, supra at 287.

The Respondent maintains that the Respondent discharged Lozano for the sole reason that he falsified his application for employment. The General Counsel asserts that the Respondent discharged Lozano because of its desire to discourage union activities and that the Respondent's reason for discharge was pretextual.

To support his contention the General Counsel has provided credible evidence from which it may be derived: that the Respondent was adamantly antiunion and to such a degree as to commit unfair labor practices in order to discourage employees from voting for the Union; that the Respond-

[31] Employees had petitioned the Company to keep Lozano in its employ.

[32] Thus in Lozano's case Gutfreund arbitarily and out of hand rejected these things which are generally considered in mitigation by reasonable men.

[33] Gutfreund did not follow his procedure in Lozano's case.

[34] ''[T]he 'real motive' of the employer is an alleged Section 8(a)(3) violation is decisive.'' *NLRB v. Brown Food Store*, 380 U.S. 278, 287 (1965). ''It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test.'' *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961). ''Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. . . . It has long been established that a finding of violation under this section will normally turn on the employer's motivation.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965).

ent's hiring policy allowed the hiring of felons; that since Lozano's felony conviction was well known on the floor of the plant and the Respondent required supervisors to report the presence of felons in its work force, it may be reasonably inferred that the Respondent knew of Lozano's background well before the objections hearing; that the alleged investigation and hearing afforded Lozano was orchestrated as window dressing to legitimatize and cover up the employer's real motive because the Respondent had already determined to discharge Lozano before Lozano's alleged hearing. The discharge was a fait accompli at the time of the alleged hearing; that the Respondent's refusal in accordance with its usual policy to consider matters in mitigation, which Lozano's excellent work record, his complete rehabilitation, and his service to the community as a proponent of a free drug world (which in its nature was compatible to a free drug plant) warranted, indicated that the Respondent's preconceived purpose was to utilize Lozano's discharge as a means of discouraging union activity; that Lozano was an excellent worker of high moral character and one not likely to be discharged for the reason given; that Lozano was a strong union partisan whose discharge would eliminate a union vote (the vote was 62 for the Union and 60 against the Union) and encourage other employees to abandon the Union, thus reducing the Union's bargaining strength; that Lozano was discharged shortly after he had testified against the Respondent in the objections hearing; that Lozano's background was tolerated until it was to the Respondent's antiunion purpose to discharge him; that Lozano made an honest mistake in answering the felony question on his job application; that the alleged ''mark of the beast'' utterance became a major issue only after the Union won the election and the Respondent wanted to upset it; that there was a conflict of testimony among the Respondent's witnesses; and that the Respondent had no written policy on discharge for falsification of an application or on the hiring of a drug trafficker; and that the Respondent's seemingly inhumane[35] treatment of Lozano, a good man and a good employee and a known union partisan, can be explained only in terms of the Respondent's antiunion animus. I find that the General Counsel has established a prima facie case.

Gutfreund insisted at the hearing that Lozano was discharged for falsification of his job application for which there could be no mitigation. (He must protect the integrity of the rule.) However, in the memorandum to the employees appears this language,

> Under the company rules and policies misrepresenting or omitting information on a job application or during the interviewing process may result in termination, *depending on the nature of the misrepresentation, error or omission*. . . . While not every subsequently discovered error or omission will result in the employee's discharge, *if the omitted or misrepresented fact would have caused the company not to hire the employee* (had the company known about it at the time) *then it is the company's practice to terminate that person*.'' [Emphasis added.]

This rule appears to have been cut to fit the Lozano case, since no such written rule seems to have been in place. If the rule applied (as it appears to have been from the memorandum), it must be concluded that Lozano would not have been fired if the alleged misrepresentation would not have caused the Respondent not to hire him even though a misrepresentation appeared on his employment application.

Bell was the hiring officer. Following the Company's line he asserted that he would not have hired Lozano because the Respondent ran a drug free workplace. This reason doesn't seem reasonable or persuasive, because Lozano's objection to drugs was at least as strong as that of the Respondent. Lozano was a prospective ideal employee in this respect. Moreover, Bell had no difficulty hiring felons and past drug users, even a convicted thief. Indeed, the chances are favorable that Bell might have hired Lozano even though he was felon for he was a good worker, rehabilitated, of high moral character and *recommended by an individual from the Spanish community in whom Bell had great confidence*.[36] [Emphasis added.]

Although Bell said that Lozano's conviction would not have related well with a job in Respondent's plant, that seems to be negated by Lozano's fine work record. Although it may be argued by the Respondent that Lozano may not have been fit to be hired surely *he had demonstrated that he was fit to be retained*.[37] [Emphasis added.] Moreover, Lozano has demonstrated that Bell's apprehensions were unfounded since Lozano was an exemplary employee.

On the credible evidence in this case, I cannot find that Lozano would not have been hired.

Nevertheless the Respondent claims that it had an absolute, undeviating policy of discharging an employee for a falsification on an employment application. It cites two examples the discharges of Dennis Gardner and Bryan Bruce. Bruce was fired because of the Respondent's policy against nepotism. Gardner was incompetent. Neither were union partisans. Neither were fired during a period when the Respondent was conducting an illegal antiunion campaign. Thus, their discharges have little resemblance to Lozano's discharge.

The Respondent's claim that it was wedded to a policy that demanded discharge without recourse for falsification of an employment application was a pretext to cover its real motive. The credible evidence establishes that its real motive in discharging Lozano was to discourage union activities. It was in line with the stance taken during the election campaign. If the Respondent succeeds in upsetting the election it will have reduced the Union's majority from two to one; if there is a new election the majority will be, no doubt, reduced by the impact of Lozano's discharge. Moreover, if an order to bargain is finally issued the impact of Lozano's dis-

[35] Apparently DeWald considered the Respondent to be a humane employer since he thought the Respondent had hired Lozano under a rehabilitation program, ''working with the judicial system, in trying to reform a convict.'' Moreover the Respondent helped employees who disclosed their drug habits and sought help. Bell testified, ''If a person is an employee and has a problem with drugs and he comes forward and says, I've got this problem I need rehab . . . then we would arrange it for him.''

[36] ''I always heeded these recommendations because they were always good.''

[37] Bell was asked if an employee revealed that he sold drugs to support his habit what would happen to him. Bell answered, ''I don't know.'' A user would have been given help by the Respondent.

charge, if upheld, will no doubt reduce the Union's bargaining strength.

I do not believe that Lozano was discharged, because he is alleged to have falsified his application. I conclude that the reason advanced by the Respondent for the discharge of Lozano is pretexual[38] and the real motive for discharging Lozano was discriminatory. The credible evidence in this case sustains the General Counsel's complaint regarding the discharge of Lozano by a preponderance of the credible evidence. I am convinced that Lozano would not have been discharged if he had not engaged in protected union activities. See *Wright Line*, supra. On the credible record it is clear that the Respondent offered an implausible and false explanation for Lozano's discharge. The discharge was for the purpose of discouraging employees' union affection. I find that the discharging of Lozano, as detailed, violated Section 8(a)(1) and (3) of the Act. See *Owners Maintenance Corp.*, 232 NLRB 100 (1977).[39]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to exert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging Alfredo Lozano on March 28, 1996, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully discharged Alfredo Lozano, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer Alfredo Lozano immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of his discharge to fill the position, and make him whole for any loss of earnings he may have suffered by reason of the Respondent's acts here detailed, by payment to him of sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of a valid offer of reinstatement, less his net interim earnings during such periods, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Royalite, a Division of Uniroyal Technology Corporation, Warsaw, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union or concerted activities of its employees or their membership in United Paperworkers International Union, AFL–CIO, CLC or any other labor organization, by unlawfully and discriminatorily discharging its employees or discriminating against them in any manner in respect to their hire and tenure of employment or conditions of employment in violation of Section 8(a)(3) and (1) of the Act.

(b) Unlawfully soliciting complaints from employees and explicitly or implicitly promising to remedy or adjust them.

(c) Unlawfully informing employees that choosing the Union would be futile, that the Respondent would break the Union, and that bargaining would start from scratch.

(d) Unlawfully giving the impression of surveillance of employees' union activities.

(e) Unlawfully interrogating employees concerning their union activities and their wearing of prounion buttons.

(f) Unlawfully threatening that the plant would close if the Union came in the plant.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Alfredo Lozano full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Alfredo Lozano whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

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[38] See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). ''[A] finding of pretext means that the reasons advanced by the [Respondent] either did not exist or were not in fact ruled upon thereby leaving intact the inference of wrongful motive established by the General Counsel.''

[39] *South Nassau Communities Hospital*, 262 NLRB 1166 (1982), cited by the Respondent involves an employee who deliberately fasified his employment application. This is not the instant case.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility at Warsaw, Indiana, copies of the attached notice marked ''Appendix.''[41] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleged violations of the Act other than those found in this decision.

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully solicit complaints from our employees and explicitly or implicitly promise to remedy or adjust them.

WE WILL NOT discourage union or concerted activities of our employees or their membership in United Paperworkers International Union, AFL–CIO, CLC or any other labor organization, by unlawfully and discriminatorily discharging our employees or discriminating against them in any manner in respect to their hire and tenure of employment or conditions of employment.

WE WILL NOT unlawfully inform our employees that choosing the Union will be futile, that we will break the Union, and that bargaining will start from scratch.

WE WILL NOT unlawfully give the impression of surveillance of employees' union activities.

WE WILL NOT unlawfully interrogate employees concerning their union activities and their wearing of prounion buttons.

WE WILL NOT unlawfully threaten that our plant will close if the Union is in the plant.

WE WILL NOT discharge or otherwise discriminate against you because of your support or assistance to United Paperworkers International Union, AFL–CIO, CLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Alfredo Lozano full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alfredo Lozano whole for any loss of earnings and other benefits suffered as a result of the discrimination against him with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Lozano's wrongful discharge and within 3 days thereafter notify Lozano in writing that this has been done and the discharge will not be used against him in any way.

ROYALITE, A DIVISION OF UNIROYAL TECHNOLOGY CORPORATION